

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHARON CARTER, No C 08-5095 VRW
Plaintiff, ORDER
v
MICHAEL J ASTRUE, Commissioner of
Social Security,
Defendant.

18 Plaintiff Sharon Carter brings this action under 42 USC §
19 405(g) to obtain judicial review of the Social Security
20 Administration's (SSA's) final decision denying her application for
21 disability insurance benefits (DIB) and supplemental security
22 income (SSI). Doc #9. The parties have filed cross-motions for
23 summary judgment. Docs #9, #12. For the reasons stated herein,
24 the court DENIES plaintiff's motion and GRANTS defendant's motion.

26 I
27 Plaintiff was born on January 10, 1951. Administrative
28 Record (AR) 130 (Doc #8). She completed thirteen years of formal

1 education and from 1988 to 2000 she worked as a computer operator
2 and billing technician for an adolescent treatment center. AR 152,
3 188. Plaintiff testified that she stopped working when two car
4 accidents, one in September 2000 and the other in May 2001,
5 exacerbated an existing back injury that she suffered while
6 coaching a track meet in 1996. AR 51.

7 On January 12, 2001, plaintiff filed her first
8 application for SSI and DIB alleging disability since June 23, 2000
9 due to back problems, sciatica and high blood pressure. AR 8, 55.
10 After a lengthy administrative process, on March 17, 2005, the
11 administrative law judge (ALJ) issued an unfavorable decision
12 finding that although plaintiff was not able to perform her past
13 relevant work, she was nonetheless able to perform a wide range of
14 work at the "medium" level of exertion. AR 8, 11-15. This court
15 affirmed that decision. AR 50.

16 On October 16, 2006, plaintiff filed her second
17 application for SSI and DIB alleging disability due to the same
18 symptoms as those listed in her first application. AR 130-37. But
19 the medical records of plaintiff's treating physician Dr Raymond Yu
20 showed no substantial changes in plaintiff's condition since the
21 final decision of her last application. AR 271-89. The SSA
22 completed a "Chavez (AR 97-4(9)) Screening Guide" which indicated
23 that the case was subject to SSA's Acquiescence Ruling 97-4(9),
24 developed to help the SSA comply with the requirements of Chavez v
25 Bowen, 844 F2d 691 (9th Cir 1988) in cases involving prior rulings
26 by the SSA on the same or similar evidence and that plaintiff's
27 previous file was retrieved. AR 174. A Psychiatric Review
28 Technique form completed by an agency consulting physician on

1 February 13, 2007 found "no medically determinable impairment." AR
2 244-54. On February 23, 2007, the SSA denied plaintiff's second
3 application for SSI . AR 79, 85. Plaintiff filed a request for
4 reconsideration of her second application. AR 91.

5 In the interim, on March 13, 2007, plaintiff visited Dr
6 Yu complaining that her back pain had gotten worse and that there
7 was a new pain in her thighs. AR 272. Dr Yu noted that plaintiff
8 was experiencing more pain and recorded his impression that
9 plaintiff had worse sciatica on the left side and increased
10 hypertension. AR 272. Dr Yu ordered a magnetic resonance imaging
11 (MRI) scan of plaintiff's lumbar spine. The report compared the
12 findings to those in a study dated August 2, 2004. AR 285. The
13 report commented that a "mild diffuse disc bulge with moderate
14 facet arthropathy at L5-S1 causes stable mild bilateral foraminal
15 narrowing, unchanged. There is significant central stenosis [and]
16 * * * mild lateral recess narrowing and encroachment of the exiting
17 S1 nerve roots, slightly progressed since prior study." Id.

18 On August 14, 2007, agency medical consultant Dr S A
19 Bussey completed a residual functional capacity (RFC) assessment
20 for plaintiff. AR 290-96. That assessment found plaintiff able to
21 lift twenty pounds occasionally and ten pounds frequently, stand or
22 walk and sit six hours in an eight-hour workday with unlimited
23 pushing and/or pulling, frequent climbing, stooping, balancing,
24 crouching and crawling and occasional kneeling and crawling. AR
25 291-92. The RFC assessment noted no manipulative, visual,
26 communication or environmental limitations. AR 292-93. In an
27 accompanying "case analysis" Dr Bussey expressed uncertainty as to
28 why the VE had determined that plaintiff could not perform past

1 relevant work and wrote that the new MRI showing central stenosis
2 would warrant changing plaintiff's RFC assessment to "light" work.
3 AR 295-96. The analysis noted that only if plaintiff's RFC was
4 determined to be less than sedentary would she be deemed disabled.
5 *Id.*

6 After the SSA denied plaintiff's application for benefits
7 upon reconsideration, plaintiff filed a request for a hearing
8 before an ALJ. AR 101.

9 On May 27, 2008, the same ALJ who had adjudicated two
10 previous applications for benefits by plaintiff (AR 8), held an
11 administrative hearing. AR 20. Plaintiff testified that: she had
12 not attempted to work since 2000 due to back pain that was
13 traveling down her legs to her feet (AR 27) and that she was taking
14 only Motrin for the pain and did not use a cane for walking. AR
15 28. Medical Expert (ME) Dr Anthony E Francis testified that the
16 recent MRI scan did not necessarily demonstrate that plaintiff's
17 condition was worse and that, in either event, the condition would
18 resolve itself within a year or two. AR 38. ME Francis further
19 testified that nothing in plaintiff's medical record indicated
20 motor weakness, loss of reflexes or a demonstrable dermatome change
21 supporting radiculopathy. AR 38-39. ME Francis stated that
22 plaintiff's was "not the most severe chronic pain case that we've
23 seen" because ibuprofen, not narcotic pain medication, was used.
24 AR 40. ME Francis concurred that a RFC assessment for light work
25 was appropriate. AR 40. Vocational Expert (VE) Malcolm Brezinsky
26 testified that, given plaintiff's RFC assessment, she could perform
27 her past relevant work as it is performed in the national economy
28 but not as she had actually performed it. AR 42.

1 On June 25, 2008, the ALJ issued his decision finding
2 plaintiff not disabled. AR 5. The ALJ concurred with the state
3 agency medical consultants and found plaintiff able to perform a
4 range of light work. AR 13. The ALJ discredited plaintiff's
5 contentions that her back pain was disabling based on: the
6 testimony of ME Francis; the medical records of Dr Yu noting that
7 plaintiff declined both a referral to a spine clinic and
8 injections; the strength of her medication; the fact that plaintiff
9 had not sought further opinions or specialized care; and the fact
10 that no treating or examining physician had concluded that she was
11 disabled during the relevant period. AR 13-14. The ALJ further
12 wrote:

13 The claimant has not tried to work at all, indicating
14 possibly no motivation to return to work. She
15 describes a fairly low level of physical activity,
16 but there is no medical explanation to support that
17 description. I recognize that the claimant is
disappointed that she is no longer able to be as
active as she once was, but Social Security
disability benefits are based on an inability to work
at all, not just whether the person can do exactly
what she did previously.

19 AR 14. The ALJ found plaintiff able to perform her past relevant
20 work as a billing technician and therefore not disabled. AR 15.
21 The ALJ addressed the difference in his finding regarding
22 plaintiff's past relevant work from his previous decision:

23 In my previous decision, I concluded the claimant
24 could not do her previous work, based on the testimony
25 by the [VE] then present. At this hearing, however,
26 the period of time at issue is after the effective
date of that previous decision. As I have accepted
the claimant's argument that there have been changed
circumstances, the res judicata effect of the prior
decision is overcome as to the period after March 17,
27 2005.

28 AR 15.

1 Plaintiff unsuccessfully sought Appeals Council review of
2 the ALJ decision. AR 1. The ALJ's decision thus became final and
3 plaintiff timely sought judicial review of that decision. Doc #9.
4

5 II

6 "The Secretary's decision to deny benefits will be
7 disturbed only if it is not supported by substantial evidence or is
8 based on legal error." Andrews v Shalala, 53 F3d 1035, 1039 (9th
9 Cir 1995) (citations omitted). "Substantial evidence means more
10 than a mere scintilla but less than a preponderance; it is such
11 relevant evidence as a reasonable mind might accept as adequate to
12 support a conclusion." Id.

13

14 III

15 A

16 Plaintiff first argues that the ALJ committed legal error
17 by failing to give res judicata effect to his previous finding that
18 plaintiff is not able to perform her past relevant work, citing
19 Chavez v Bowen, 844 F2d at 693. Doc #9 at 5-7. In Chavez, the
20 wrote that "the principles of res judicata apply to administrative
21 decisions, although less rigidly to administrative proceedings than
22 to judicial proceedings," so that findings concerning RFC,
23 education and work experience were "binding" in subsequent
24 proceedings absent "new and material evidence." Id at 694. See
25 also Stubbs-Danielson v Astrue, 539 F3d 1169, 1173 (9th
26 2008) ("ALJ's findings concerning [RFC], education, and work
27 experience are entitled to some deference and such findings cannot
28 be reconsidered by a subsequent judge absent new information not

1 presented to the first judge"). Under the SSA's Acquiescence
2 Ruling 97-4(9), which applies only to "subsequent disability
3 claim[s] with an unadjudicated period arising under the same title
4 of the Act as a prior claim on which there has been a final
5 decision by an ALJ * * * that the claimant is not disabled" arising
6 within the geographical territory of the Ninth Circuit, the SSA
7 applies a "presumption of continuing nondisability" that the
8 claimant bears the burden of rebutting. Acquiescence Ruling 97-
9 4(9) (December 3, 1997). Such a claimant must show a "changed
10 circumstance" affecting the issue of disability within the period
11 at issue, such as a change in the claimant's age category or in the
12 disability criteria, a new impairment or an increase in severity of
13 an existing impairment. *Id.*

14 In the March 17, 2005 decision, the ALJ found plaintiff
15 to have a RFC to perform a wide range of medium work but not able
16 to perform her past relevant work; in the June 25, 2008 decision,
17 the ALJ found plaintiff to have a RFC to perform light work but
18 able to perform her past relevant work. AR 12-15.

19 As noted above, the ALJ explained that he drew different
20 conclusions following the two different hearings based on
21 differences in the VE testimony. But another reason for the
22 underlying discrepancy is apparent from an examination of the
23 transcripts of the two hearings: the VE in the previous proceeding
24 examined and opined on the work "as the claimant actually performed
25 it" and as described in the Dictionary of Occupational Titles
26 (Carter v Barnhart, 3:05-cv-02486-VRW, Doc #4 at 456-57), whereas
27 the VE in the later proceedings opined that plaintiff's past
28 relevant work as a billing clerk was sedentary (and suitable for a

1 person of plaintiff's RFC) "as generally performed in the national
2 economy" (20 CFR § 416.960(b)(2)) but that in her specific case,
3 certain additional duties has brought her work to the medium level
4 (AR 15, 41-42). As the court understands Chavez, new VE testimony
5 as to plaintiff's ability to perform her past relevant work under a
6 different but allowable definition that yields a different result
7 is new and material evidence warranting reconsideration of a prior
8 finding.

9 The ALJ's findings are afforded only "some" preclusive
10 effect, so a rigid application of res judicata principles is not
11 warranted (Stubbs-Danielson, 539 F3d at 1173); moreover, a finding
12 that a claimant is disabled is not regarded as immutable under the
13 regulations, but rather is subject to periodic review and re-
14 evaluation. 20 CFR § 404.1589, § 416.989 ("After we find that you
15 are disabled, we must evaluate your impairment(s) from time to time
16 to determine if you are still eligible for payments based on
17 disability."). More importantly, the new VE testimony concerned
18 the period after the previous decision so a presumption of non-
19 disability applied. Accordingly, the ALJ did not commit legal
20 error by finding plaintiff able to perform her past relevant work.

21
22 B
23
24 Plaintiff also argues that the ALJ committed legal error
25 by failing to point to clear and convincing reasons for rejecting
26 plaintiff's testimony regarding her level of pain. Doc #9 at 7-8.
27 The Ninth Circuit has held that the ALJ must provide specific and
28 cogent reasons for rejecting plaintiff's complaints. Lester v
Chater, 81 F3d 821, 834 (9th Cir 1995). But the ALJ did address

1 this consideration with care, devoting several paragraphs of his
2 decision to the discrepancy between plaintiff's complaints and the
3 medical evidence. AR 14. The ALJ noted ME Francis's opinion that
4 the lack of evidence of motor weakness, reduced reflexes, atrophy
5 or dermatome change was inconsistent with serious pain, as was the
6 lack of radiculopathy and the use of mild analgesic and the absence
7 of narcotic medications was inconsistent with severe chronic pain.
8 AR 13. The ALJ also noted plaintiff's conservative treatment
9 regimen and failure to seek "new treatments, further opinions, or
10 specialized care," her rejection of surgery, injections and
11 physical therapy, infrequent medical visits and total lack of work
12 activity. AR 14. Accordingly, the ALJ provided clear and
13 convincing reasons for discounting plaintiff's pain testimony and
14 there is no basis for the court to disturb his assessment.

15
16 IV

17 For the foregoing reasons, plaintiff's motion for summary
18 judgment (Doc #9) is DENIED and defendant's motion for summary
19 judgment (Doc #12) is GRANTED. The clerk is directed to enter
20 judgment in favor of defendant and to close the file and terminate
21 all pending motions.

22
23 IT IS SO ORDERED.

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26
27 VAUGHN R WALKER
28 United States District Chief Judge